

NOT TO BE PUBLISHED IN OFFICIAL REPORTS

California Rules of Court, rule 8.1115(a), prohibits courts and parties from citing or relying on opinions not certified for publication or ordered published, except as specified by rule 8.1115(b). This opinion has not been certified for publication or ordered published for purposes of rule 8.1115.

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FOURTH APPELLATE DISTRICT

DIVISION THREE

R U BUMPY, INC.,

Plaintiff and Appellant,

v.

INTERNATIONAL UNION OF
OPERATING ENGINEERS, LOCAL 12
et al.,

Defendants and Respondents.

G039821

(Super. Ct. No. 04CC05039)

O P I N I O N

Appeal from a judgment of the Superior Court of Orange County, Clay M. Smith, Judge. Affirmed.

Ives & Associates and Robert N. Ives for Plaintiff and Appellant.

Law Offices of Carroll & Scully, Donald C. Carroll, Charles P. Scully II and David P. Koppelman for Defendant and Respondent International Union of Operating Engineers Local 12.

Laquer Urban Clifford & Hodge, Christopher M. Laquer, and Marija
Kristich Decker for Defendant and Respondent Operating Engineers Funds, Incorporated.

* * *

Plaintiff R U Bumpy, Inc. (RUBI), appeals from an order of dismissal entered after the court sustained (1) the demurrer of defendant International Union of Operating Engineers Local 12 (Union) to RUBI's fraud claim in its third amended complaint on the ground such claim was barred by the statute of limitations, and (2) the demurrer of defendant Operating Engineers Funds, Inc. (Lender) to RUBI's fraud claim in its fourth amended complaint on the ground such claim failed to state facts constituting a cause of action. Both demurrers were sustained without leave to amend.¹ RUBI contends its fraud claim against Union was not barred by the statute of limitations because, although RUBI did not name Union as a defendant in the caption of the original complaint and did not promptly serve Union, RUBI did identify Union as a defendant in the body of the complaint. RUBI contends its fraud claim against Lender stated a cause of action by alleging representatives of both Lender and Union made misrepresentations upon which RUBI and its principal, Robert Utgard, reasonably relied. As we shall explain, the court properly sustained both demurrers because RUBI failed to allege sufficient facts to state a cause of action for fraud. We therefore affirm the judgment.

¹ "An order sustaining a demurrer without leave to amend is not an appealable order, but an order dismissing a case is an appealable order." (*Hudis v. Crawford* (2005) 125 Cal.App.4th 1586, 1590, fn. 4.)

FACTS

RUBI and Utgard (plaintiffs) filed their original complaint on April 19, 2004. The caption did not include Union as a named defendant. Five months later, in September 2004, plaintiffs served the complaint on only the defendants named in the caption (not Union). But the complaint's general allegations, its second cause of action (for "Breach of Contract against IUOE Local 12 and [Doe defendants]"), and its third cause of action (for fraud) expressly identified Union as a defendant.

In March 2005, plaintiffs filed an amended complaint naming Union as a defendant in the caption and served Union for the first time on April 6, 2005. Union, Lender and another defendant removed the case to federal court. Plaintiffs then filed a second amended complaint which deleted their federal claim for breach of a collective bargaining agreement. Due to the elimination of that claim, the federal district court remanded the action to state court.

Union's Demurrer to Third Amended Complaint

In November 2006, plaintiffs filed their third amended complaint, alleging the following background facts. Utgard formed RUBI, a California corporation in August 1999, for "the specific purpose of permitting" RUBI to enter into a consulting services agreement (the Contract) with SJD Partners, Ltd. (SJD Ltd.) (through its general partner SJD Corp.). Under the Contract, RUBI was to provide Geotechnical engineering inspection, testing, and soil engineering consulting services to SJD Ltd. regarding a construction project. SJD Ltd. was the owner and developer of the project. Lender was the construction lender funding the project. In December 1999, SJD Ltd. and SJD Corporation announced the project "would be suspended for a short time." The ensuing suspension of activity actually lasted over 13 months.

The third amended complaint's fraud cause of action against all defendants (i.e., SJD Ltd., SJD Corp., Union and Lender) described four basic misrepresentations made by Union to RUBI: (1) Union approved RUBI as a qualified union signatory company and confirmed Utgard as RUBI's employee; (2) Union would not object to RUBI performing the Contract, so long as RUBI maintained the insurance required under the Contract and made Lender an additional insured under the insurance policy; (3) Union would not object to RUBI performing the Contract, so long as RUBI had a civil engineer on staff; and (4) due to the financial stress to Utgard and RUBI resulting from the 13-month suspension of activity on the project, Union would allow Utgard to bring his delinquent union dues current after plaintiffs received their first payment on the Contract.

Work on the project resumed in January 2001, and RUBI "performed duties under the [Contract]." In March 2001, RUBI "submitted its first bill for [its] first draw to SJD Ltd. and SJD Corp." But on April 18, 2001, RUBI was told it was being replaced by another company because Utgard "was in arrears with his union dues and because [RUBI] did not have a civil engineer on staff." RUBI had hired a civil engineer as a consultant over a year earlier and Utgard offered to pay all of his unpaid union member dues, but Union refused to permit plaintiffs back on the project job site.

RUBI further alleged that "[d]efendants intended and conspired to prevent Plaintiffs from performing the [Contract] by excluding UTGARD and RUBI from the Project job site under the pretextual claims that UTGARD's union dues were unpaid and that RUBI had no civil engineer on staff." "Defendants harbored the undisclosed intention to utilize the services of Plaintiffs only so long as was convenient and advantageous to Defendants, thereby furthering their own objectives of retaining funding and allowing construction of the Project to progress. They obligated Defendants to be on call, so as to have a geotechnical engineer always available during the protracted, thirteen month work suspension."

RUBI alleged damages “in an amount of at least \$120,000.00, consisting of RUBI’s lost profit from the [Contract],” and damage “from being impaired in [its earning] capacity to continue to do business during the pendency of the [Contract] and thereafter.” Plaintiffs further alleged they were entitled to punitive damages.

Union demurred to the fraud cause of action on grounds RUBI lacked legal capacity to sue as it was suspended by the California Secretary of State; the court lacked jurisdiction due to federal preemption under section 301(a) of the Labor Management Relations Act and the exclusive jurisdiction of the National Labor Relations Board; the claim was barred by the statute of limitations in Code of Civil Procedure section 338, subdivision (d); and the claim failed to state facts alleging justifiable reliance and that the damages were “causally connected to the alleged misrepresentations.”

The court sustained Union’s demurrer without leave to amend “because the statute of limitations under [Code of Civil Procedure section] 338[, subdivision] (d) has run and the pleadings do not relate back.”²

Lender’s Demurrer to Fourth Amended Complaint

Plaintiffs filed a fourth amended complaint against Lender, SJD Ltd., and SJD Corporation. The fourth amended complaint’s fraud cause of action against Lender alleged the same facts as the third amended complaint’s fraud claim, along with some additional facts that provided further detail, but which did not materially change the charging allegations or the resulting legal analysis as it related to the claim against Lender.

Lender demurred to the fraud claim on the grounds plaintiffs failed to state a cause of action for fraud and failed to join Union as an indispensable party. Lender

² Lender also demurred to the fraud cause of action in the third amended complaint, but the court sustained Lender’s demurrer with leave to amend. The resulting fourth amended complaint and Lender’s demurrer thereto is described below.

argued plaintiffs failed to state a cause of action because, inter alia, they failed to allege they justifiably relied on a misrepresentation made by Lender, since Lender, as a non-signatory to the Contract, “had no authority to demand anything on the Project [except additional insured status on the insurance policy], no authority to stop RUBI’s performance and no authority to have Plaintiffs removed from the Project.”

The court sustained Lender’s demurrer without leave to amend, stating, inter alia: “[P]laintiffs have not pled several elements, including any fraudulent representations by [Lender], actual reliance, and justifiable reliance. Also, the element of justifiable reliance cannot be established as a matter of law since the contract was entered into with SJD Partnership LTD, SJD retained the right to discharge plaintiffs, and SJD Partnership LTD is the entity that contracted to replace plaintiffs on the project. Hence, in their fourth amended complaint, plaintiffs have again failed to plead the elements of fraud, and they cannot establish justifiable reliance as a matter of law.”

DISCUSSION

We review the complaint “de novo to determine whether it contains sufficient facts to state a cause of action. [Citation.] In doing so, we accept as true the properly pleaded material factual allegations of the complaint, together with facts that may be properly judicially noticed.” (*Hernandez v. City of Pomona* (1996) 49 Cal.App.4th 1492, 1497.) We do not assume the truth of pleaded “‘contentions, deductions or conclusions of fact or law.’” (*Blank v. Kirwan* (1985) 39 Cal.3d 311, 318.) “The judgment must be affirmed ‘if any one of the several grounds of demurrer is well taken. [Citations.]’ [Citation.] However, it is error for a trial court to sustain a demurrer when the plaintiff has stated a cause of action under any possible legal theory. [Citation.] And it is an abuse of discretion to sustain a demurrer without leave to amend if the plaintiff shows there is a reasonable possibility any defect identified by the defendant can

be cured by amendment.” (*Aubry v. Tri-City Hospital Dist.* (1992) 2 Cal.4th 962, 967 (*Aubry*)). The plaintiff “bears the burden of demonstrating that the trial court erroneously sustained the demurrer as a matter of law” and “must show the complaint alleges facts sufficient to establish every element of [the] cause of action.” (*Rakestraw v. California Physicians’ Service* (2000) 81 Cal.App.4th 39, 43.)

On appeal RUBI does not contend it can cure defects in its complaint by amending the document. Rather, RUBI asserts here, as it did below, that the third and fourth amended complaints alleged facts satisfying all elements of a fraud cause of action against Union and Lender respectively.

“““The elements of fraud . . . are (a) misrepresentation (false representation, concealment, or nondisclosure); (b) knowledge of falsity (or ‘scienter’); (c) intent to defraud, i.e., to induce reliance; (d) justifiable reliance; and (e) resulting damage.””” (*Small v. Fritz Companies, Inc.* (2003) 30 Cal.4th 167, 173; Civ. Code, § 1709.) “Plaintiffs must show ‘actual’ reliance, i.e., that the representation was an “‘immediate cause’” that altered their legal relations. [Citations.] Besides actual reliance, plaintiff must also show ‘justifiable’ reliance, i.e., circumstances were such to make it *reasonable* for plaintiff to accept defendant’s statements without an independent inquiry or investigation.” (*Wilhelm v. Pray, Price, Williams & Russell* (1986) 186 Cal.App.3d 1324, 1331-1332.) In addition, in “order to recover for fraud, as in any other tort, the plaintiff must plead and prove the ‘detriment proximately caused’ by the defendant’s tortious conduct.” (*Service by Medallion, Inc. v. Clorox Co.* (1996) 44 Cal.App.4th 1807, 1818.)

The Court Properly Sustained Union’s Demurrer Without Leave to Amend

We need not consider whether RUBI’s fraud claim against Union was barred by the statute of limitations because we conclude RUBI failed to state a cause of action for fraud against Union. (*Aubry, supra*, 2 Cal.4th at p. 967 [order sustaining

demurrer may be affirmed on ““any one of the several grounds of demurrer””].) Union demurred to the fraud claim in the third amended complaint on the ground, inter alia, plaintiffs failed to state a cause of action against Union because the claim did not allege justifiable reliance or “damages causally connected to the alleged misrepresentations.”

As noted in our recitation of the facts, despite the prolix of the third amended complaint, RUBI alleged four basic misrepresentations by Union: (1) Union approved RUBI as a qualified union signatory company and confirmed Utgard as RUBI’s union employee; (2) Union would not object to RUBI performing the Contract, so long as RUBI maintained the insurance required under the contract and made Lender an additional insured under the insurance policy; (3) Union would not object to RUBI performing the Contract, so long as RUBI had a civil engineer on staff; and (4) Union would allow Utgard to bring his union dues current after plaintiffs received their first payment from Lender.

The first and second alleged misrepresentations relating to a union signatory company and the maintenance of insurance were not the alleged basis for the removal of Utgard from the project site. Rather, the alleged basis for such removal was that Utgard was delinquent in paying his union dues and appellant had no civil engineer on staff. Therefore, RUBI has failed to allege a causal connection between its damages and those misrepresentations.

The significance of the third and fourth misrepresentations (relating to a civil engineer and delinquent union dues) is based on the assumption that Union had the *authority* to permit RUBI to perform the Contract and/or the *authority* to bar RUBI from performing the Contract or to bar plaintiffs from being present at the project site. The third amended complaint fails to state a fraud cause of action because it does *not* allege Union had any such authority (so as to cause the resulting harm to plaintiffs) or that plaintiffs reasonably believed Union had such authority and therefore *justifiably* relied on Union’s representations as a guarantee of job security. RUBI apprises us of no source

from which Union (or Lender) derived an authority to permit RUBI to perform the Contract or to bar plaintiffs from the job site.

The third amended complaint alleges RUBI, as consultant, entered into the Contract with SJD Ltd., as owner, and incorporates the Contract by reference. Union was not a party to the Contract. Union is mentioned only once in the Contract (In Exhibit A incorporated into the Contract by reference): RUBI's "Senior Soils Field Technician" was required under the Contract to "maintain [Union] membership as a member in good standing with the Union of Operating Engineers." But the Contract gives SJD Ltd. the contractual right (1) to approve and pay RUBI's invoices; (2) to be notified by RUBI of any requirement by RUBI for additional personnel beyond the Senior Soils Field Technician; (3) to terminate the Contract "at any time with or without cause upon giving written notice"; and (4) to require RUBI (who warranted that all its employees would be fully qualified and appropriately licensed) "to remove from the Project any employee objectionable to" SJD Ltd. Thus, only SJD Ltd. had the contractual right to terminate RUBI's services on the project, a right that was absolute and unconditional since SJD Ltd. could terminate the Contract at any time with or without cause. Furthermore, the Contract contained an integration clause whereby the document contained the entire agreement regarding RUBI's services on the project and could be modified or supplemented only in writing.

Thus, the third amended complaint failed to allege facts showing plaintiffs justifiably relied on Union's alleged misrepresentations about job security under the Contract, or that RUBI had suffered damage *caused* by the alleged misrepresentations — essential elements of a fraud claim. The court properly sustained Union's demurrer to plaintiff's fraud cause of action without leave to amend.

The Court Properly Sustained Lender's Demurrer Without Leave to Amend

The allegations of fraud in the fourth amended complaint suffer from the same infirmity with respect to Lender as they do with Union. These representations cannot form the basis for a fraud cause of action because the fourth amended complaint failed to allege Lender's *authority* to permit RUBI to perform the Contract or its *authority* to bar plaintiffs from the job site. As discussed above with regard to Union, the Contract does not provide any such authority to Lender (as opposed to SJD Ltd.). Therefore, the fourth amended complaint failed to allege sufficient facts to show RUBI justifiably relied on, and suffered damages caused by, Lender's alleged statements that (1) Lender would not object to RUBI performing so long as a civil engineer was on staff and (2) Utgard could pay his overdue union dues from his first payment under the Contract. The court properly sustained Lender's demurrer to the fraud cause of action without leave to amend.

DISPOSITION

The judgment of dismissal is affirmed. Defendants shall recover their costs on appeal.

IKOLA, J.

WE CONCUR:

RYLAARSDAM, ACTING P. J.

MOORE, J.